United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig - Contains Affidavit of mailing.

76-1083

To be argued by
SAMUEL H. DAWSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1083

UNITED STATES OF AMERICA,

Appellee,

—against—

JAMES M. HENDRIX,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLEE

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TABLE OF CONTENTS

PAGE

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases:

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Preliminary Statement

Appellant James M. Hendrix appeals from a judgment of conviction entered on February 20, 1976 after a jury trial in the United States District Court for the Eastern District of New York (Costantino, *J.*), which judgment convicted appellant, as charged, of murder in the second degree, in violation of Title 18, United States Code, Section 1111.[1] Appellant was sentenced to nine years imprisonment and is currently serving that sentence.

On this appeal, appellant understandably does not challenge the sufficiency of the evidence against him, nor does he question the quality of the Government's evidence re-

[1] This was appellant's second trial. His first trial resulted in a mistrial after the jury failed to reach a verdict.

butting his insanity claim, but rather alleges that the trial court (1) erred in instructing the jury as to the "presumption of sanity"; (2) despite its willingness to instruct on the lesser included offense of voluntary manslaughter, should have instructed on involuntary manslaughter; and finally (3) erred in failing to entertain a defense request for a third form of verdict, to wit: "not guilty by reason of insanity".

Statement of Facts

A. The Government's Case-in-Chief[2]

At trial, the Government's witnesses testified to the following sequence of events that culminated in the death of Robert Kiedinger:

The S.S. Eagle Voyager, an American flag vessel, sailed under charter from the United States in November, 1974, with a shipment of grain destined for Russia (161).[3] Appellant was assigned to the Steward's Department on the vessel, with duties that included general cleanup of officer's quarters and maintenance of passageways (168).

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[2] With a view towards expediting the trial—since most witnesses had come from great distances—and to facilitate the jury's comprehension of the issues, counsel and the Court agreed that in addition to matters properly falling within the ambit of the Government's direct case, each witness could be examined and cross-examined on the issue of insanity, without the necessity of being recalled. (Transcript of appellant's first trial at 141-142, Transcript of second trial at page 16).

[3] The numbers in parentheses refer to the pagination of the transcript at appellant's second trial.

The vessel was owned by the Sea Transport Corporation, a Delaware Corporation, and registered with the United States Coast Guard (160-163).

Hendrix ran afoul of some of his shipmates almost immediately. His first roommate, Raul Giron, was forced to change quarters after two days with appellant due to his being excessively noisy and "wild and ugly" when intoxicated (321-322).[4] Giron worked in the same department as appellant, under the supervision of Robert Kiedinger (315-316). Giron recalled that when Kiedinger tried to advise Hendrix that if Hendrix would do his work they would never have "any trouble," Hendrix' response was to turn his back and walk away (318).

A glimpse at the depth of appellant's hatred for Kiedinger was obtained when several crewmen testified to Hendrix' vilification of Kiedinger during a shore leave interlude at Gibraltar. While in a launch returning the crew to the Eagle Voyager, Hendrix, apparently intoxicated, called Kiedinger a "mother fucking baby raper" (281). It was only after the Chief Mate, William Bellinger chastised Hendrix for sounding "like a punk" that Hendrix felt the need to apologize (453).[5] Kiedinger meanwhile removed himself to another section of the launch (453, 484).

While Kiedinger was in the best position to evaluate Hendrix' performance of his duties, (318, 447, 450), Hendrix' own attitude was illuminated by the results of a search of his room shortly after the murder. In addition

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[4] In response to a question by defense counsel, Giron also testified that when the Eagle Voyager was in Galveston, Texas, appellant assaulted a shipmate who tried to prevent Hendrix from bringing a woman onboard the vessel (337-338).

[5] The appellant testified that his remark to Kiedinger stemmed from Kiedinger's commenting upon Hendrix' rather open and notorious use of drugs on board ship (635-636). Hendrix' apology in the launch, apparently was to the Chief Mate, who had told him to "shut up" (636).

to several empty and several full bottles of alcoholic beverages being found in his room (466, 527-528), Hendrix had secreted a quantity of hashish behind a light switch plate (418, 444).[6]

In order to appreciate the events that culminated in the death of Robert Kiedinger, a recitation of the so-called "logging" incident is required.[7] According to the testimony of Captain Hamilton G. P. Thomas,[8] Kiedinger endeavored to have the appellant reprimanded on the morning of December 28th. Kiedinger complained to the master about Hendrix' work habits and requested a logging (519-520). The master authorized Kiedinger to bring appellant before him for the proceedings detailed in the margin, but Hendrix was nowhere to be found (520). The next morning, at about 9:00 a.m., Kiedinger brought Hendrix to the master's office for logging and the matter

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[6] Appellant was fully aware that possession of such a narcotic drug on board an American ship was prohibited (633). Similarly prohibited were the other drugs—heroin and opium—that appellant used "in the course of [his] travels around the world" (632). Hendrix' only dispute with respect to the hashish exhibit was the disclaimer that he did not hide it behind a switch plate, but rather "stowed" it away in the steward department bathroom (633-634).

[7] "Logging" is a shipboard procedure whereby a head of a department prefers charges against a crewmember. It encompasses such matters as being intoxicated, neglect of duties and abusiveness to superiors. With the master of the vessel acting as hearing officer, the crewman is advised of the complaint, and given an opportunity to respond. The master enters the charge, the response and the decision, in the official log of the ship. If the charge involved a failure to work, the crewman might be penalized a day's wages. Moreover, the record of the logging is referred to the shipping commissioner (447-449).

[8] Captain Thomas was Sea Transport's agent in the port of Odessa, Russia, as distinguished from the master of the vessel (514).

was concluded (521).[9] About an hour later, while Kiedinger and the boatswain, Johnson, were conversing in the messhall, appellant came in and asked Kiedinger if Kiedinger still had a gun that he purchased in port (171-172). Hendrix was told that the gun had been locked up by the master (apparently in a chest to which the master had the only key) (173).[10]

The appellant's other activity on December 29th notwithstanding, a common thread running through his varous encounters with fellow crewmen was his distress and bitterness over the logging. To Giron, the messman, Hendrix volunteered his being "upset" at having been logged (329-330). To Hearne, the radio officer, appellant seemed "distressed and upset" for what Hendrix considered to be unfair treatment in connection with the logging (367-368). To Elholm, the chief engineer, Hendrix expressed bitterness for having been "chewed out" (417). When appellant raised the matter with Bellinger, the chief mate, Bellinger told Hendrix "not to let it bother him" (483, 449). When seaman Jones saw appellant later that night, Hendrix, besides being intoxicated, appeared "agitated by something" (402-403). Finally, to Minnier, an oiler, the appellant was most explicit. Hendrix told him

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[9] Appellant would press upon this Court the notion that the logging was so inconsequential a matter as to hardly justify, let alone rationally compel, a murderous act. Appellant's Brief, p. 4, n.7. In dealing with matters of motivation, human conduct does not always run a course that would seem logically required, particularly to a dispassionate observer aided by hindsight. Suffice it to say that the jury by it's verdict, found malice and not insanity.

Idle speculation as to all the ramifications of a logging is pointless. However, appellant himself testified that as a result of his being involved in an assault on the S.S. Jeff Davis, the Coast Guard, after a hearing, suspended his seaman's papers (631, 708).

[10] Johnson related that prior to the gun being locked up he had disassembled it (237).

that he, Hendrix, had "had enough bullshit from the Steward" and he was "going to stop acting like a lamb and start acting like a lion" (271-272).

Sometime after the morning logging and appellant's inquiry as to the status of the gun, Hendrix left the ship and went ashore (346). Gary Carter, a fellow shipmate and acquaintance of appellant from Texas, saw Hendrix at 4:00 p.m. Hendrix, already intoxicated at this hour, told Carter that Kiedinger had required him to be back onboard the ship and working by that hour (347).[11]

Around 9:00 p.m., Hendrix joined a party in progress in the room of Daniel Minnier and Arlen Jones (269-270). Hendrix was still intoxicated and continued his drinking at the party (272). After indicating that he had had enough from Kiedinger, and announcing his new intention to act like a lion (or a man), Jones and the others ushered Hendrix out of the room (271-402).

Just prior to the intended sailing of the Eagle Voyager that night, Harry Allaire went from room to room making a crew count. Sometime after 1:00 p.m. he came upon appellant in the room of seaman DeLatte. According to Allaire it appeared that the men were having some sort of party (310-311).[12]

By 1:00 a.m. Robert Kiedinger lay dead on the floor of his room (193-195, 524-525).[13] At that time Hendrix

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[11] In light of Hendrix' state of intoxication and his continuing complaints about having been logged, this interruption of his shore leave privilege no doubt heightened his animosity toward Kiedinger.

[12] Allaire was offered, but refused a drink.

[13] Dr. DiMaio, New York City Chief Medical Examiner, performed a reautopsy upon the deceased. He determined that the cause of death was asphyxiation by manual strangulation—a neck bone being broken—coupled with multiple abrasions, contusions and lacerations about the face and neck. Dr. DiMaio also testified that the deceased had suffered a fractured nose. (501-504, 507).

pounded on the door of Gary Carter's cabin. Apparently still drunk, Hendrix said that he had just killed Kiedinger. When Carter's roommate fled the room, Hendrix asked Carter to help him get rid of his bloodsoaked bluejeans and boots (348-351).[14] Before the clothing could be disposed of, the roommate returned, a circumstance that apparently forced Carter and Hendrix to leave the cabin (352). As they were exiting, they came upon Daniel Minnier, on his way to a night shift assignment. Standing within a few feet of one another, Minnier noticed blood on Hendrix' jeans and forearms. Appellant warned Minnier not to say a word (277-279).[15]

By now the crime had been discovered and a search was underway for Hendrix (193-197, 325-326, 455-456).[16] Several of the ship's officers found him sitting in the room of seaman Manning, engaged in conversation (457, 195-197). Handcuffed, cursing and pulling, Hendrix was removed to the officer's lounge in midships (197-198, 327-328, 457). Further search turned up the appellant's bloodstained boots.[17] In the lounge appellant was confined to a side area primarily in the custody of the chief mate (461-462). When radio officer Hearne arrived, Hendrix confided to him that he (Hendrix) was in serious trouble and going "to catch it'. Hendrix was also anxious about

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[14] Hendrix was barechested at that time and showed no sign of any cuts or bruises (351).

[15] Appellant claims the confrontation in the passageway was "*innocuous*" (emphasis added). Appellant's Brief, p. 7 Appellant's characterization is betrayed by the fact that Hendrix, standing there in bloody pants, felt the necessity to warn Minnier twice (in expressive terms), while pointing a finger at him (278).

[16] Captain Thomas noted that in his opinion the deceased's room showed no sign of any struggle (529-530). Other crewmen observed that Hendrix was without any visable cuts, marks or bruises (200-201, 279, 327, 351, 459).

[17] The boots were found either in Hendrix' room (326), or in a firestation outside of seaman Jones' quarters (407).

what hight happen to him (379, 493, 536).[18] Though, in Hearne's opinion, appellant was intoxicated, he impressed Hearne as understanding the advice Hearne gave him to say as little as possible (379-380). Hendrix remained in the midship lounge for about five hours, during which time he talked continuously to Bellinger (462-463). While most of their talk was idle chatter, the appellant was visibly upset (465, 469). Indeed, Bellinger was impressed with the fact that the earlier logging incident still distressed Hendrix (469).[19] Though the chief mate was obviously unable to recall most of the conversation with appellant that night (463), he did remember Hendrix stating:

> "The steward [Kiedinger] deserved to die. When you fight, you fight to kill" (462).

By 5:00 a.m. it was apparent that the Russian authorities were not going to take any action that night. As a result, Hendrix was taken to a spare room, where he

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[18] Russian Immigration and Customs officials were also present in the midship lounge (523-524). Appellant's apprehension about being turned over to Russian authority was shared by the chief-mate. As Bellinger put it, ". . . none of us knew where we stood" (463).

Billinger's reference to Hendrix as "irrational" was explained as meaning very upset, very nervous, very concerned and worried (496-497). Cf., Appellant's Brief, at 8-9. With respect to the attribution to Minnier of the appellant being "strange" (Appellant's brief, at 8-9), Minnier clearly denied such an assertion (283, 303-304). Giron explained his use of the term "crazy" to mean that appellant was arguing with the captain; attempting to avoid being taken by the captain to the lounge; *wild* (342-343). Arlen Jones however, certainly testified that Hendrix was "mixed up"—when *intoxicated* (407).

[19] As Bellinger put it:

> "This log upset him seemingly more than it deserved. It really upset him" (469).

was detained [20] until he was removed from the ship at the city of Podi, Russia, (465-466, 530-531). Captain Thomas escorted appellant to Moscow, where they were joined by United States Marshals for the flight to New York (531-532). Hendrix was formally arrested at John F. Kennedy International Airport (541-542).

B. The Defense

The defense relied primarily on the testimony of three witnesses: Henry Manning, James Hendrix and Dr. Augustus Kinzel.[21]

Manning was the third cook on the Eagle Voyager and knew Hendrix from Houston, Texas (570-571). When questioned as to whether appellant did anything strange or unusual, Manning related that Hendrix would occasionally sing insulting poems [22] in the evening which he would not remember the next day (579-580).[23] In any event, Manning felt that for long periods of time on the voyage appellant behaved in a perfectly normal manner and did nothing strange (594). On the night of December 29th Hendrix came into Manning's room and told him that he, Hendrix, had killed Kiedinger (590). That night

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[20] Before being placed in the detention room, Hendrix asked Thomas if Kiedinger was dead (528). Appellant repeated this inquiry the next morning to Arlen Jones who had been assigned to guard the room (406). Jones testified that "...I asked Jim if he remembered last night. He said yes, he did" (406).

[21] Pursuant to stipulation, the defense introduced four 1971 letters of crewmen who served with appellant aboard the S.S. JEFF DAVIS (561-567).

[22] Apparently this balladeering did not endear Hendrix to some of his fellow crewmen (580, 582-583).

[23] It is difficult to assess what is truly strange or bizarre to Henry Manning. On cross-examination Manning stated that the day after the murder he believed he saw the ghost or spirit of Robert Kiedinger on the ship (593-594).

in Henry Manning's cabin, Hendrix said that he knew what he had done and that what he did was wrong (597).

James Hendrix claimed at trial that after "knocking" Kiedinger to the floor of Kiedinger's room and kicking him with the heels of his boots he had no recollection of subsequent events[24] until the moment he was removed, handcuffed, from Manning's room (639, 643-644).[25]

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[24] Hendrix did recall that prior to going to Kiedinger's room he smoked some hashish (665-666).

[25] This gap in recollection seemed to selectively expand and contract during cross-examination. A few examples follow:

"Q. Is it your testimony that on the morning of December 29th, you don't remember asking Mr. Kiedinger, the steward, whether he still had that gun in his room? A. I don't remember . . ." (658).

* * *

"Q. Do you remember being in Mr. Manning's room? A. Yes, sir.

Q. Do you remember being taken out of that room? A. Yes, sir.

Q. Do you remember sitting in a chair talking to him? A. I was in a wild state of mind. I don't remember what I said.

Q. When Mr. Manning testified—do you remember telling him in that room that you knew what you did and what you did was wrong? A. No, sir.

Q. You don't remember that? A. No, sir" (660).

* * *

"A. . . . . I don't remember going up to the lounge drinking coffee, smoking cigarettes.

Q. How about telling Mr. Billinger that the steward deserved to die? A. No, sir.

Q. You don't remember that? A. No, sir" (661).

* * *

"Q. You remember being taken to the lounge by the second mate? A. All in a haze" (661).

* * *

"Q. Now sir, in the midship lounge did you tell Mr. Hearne, as he testified here, that, "I am in trouble now.

[Footnote continued on following page]

Hendrix recounted for the jury some of his activity on the day of the murder. After completing his morning chores, he went ashore and visited a Russian girl with whom he had become friendly. Hendrix had dinner with the girl's family and went into the suburbs of Odessa to visit her grandmother. On that last day together, they had a photographer take some pictures and had a final meal at a local restaurant (684-688).

Dr. Augustus Kinzel, a psychiatrist called by the defense, testified that in his opinion Hendrix was undergoing a mental breakdown *before* the murder on December 29th (757). In concluding that appellant was insane at the time of the killing, Dr. Kinzel asserted that the appellant's intake of alcohol and drugs on the day in question would not directly have produced "murderous behavior", but may have made him "somewhat assaultive" (767-768). In recounting some impressions he obtained during his examination of Hendrix, Kinzel recalled that Hendrix had "a very strong tendency to deny he's mentally ill", and tried to make it seem to the doctor that he was quite rational (760). Hendrix sought to minimize his guilt rather than maximize his mental illness (760). It was this attempt at rationality, coupled with appellant's antipathy for demonstrating mental illness that led Kinzel to conclude that Hendrix was not malingering and was indeed insane (759-761).[26]

I am really going to catch it"? A. I really don't remember" (682).

* * *

"Q. Do you remember Mr. Hearne telling you that your best course would be not to say anything? A. Yes, sir, I do remember that" (682).

[26] As to appellant's statement to Bellinger: "The steward deserved to die", and "when you fight, you fight to kill", Kinzel concluded:

[Footnote continued on following page]

With respect to appellant's secreting his hashish behind the light switch plate, Kinzel found that fact to be of significance. Indeed, the doctor felt that act indicated that Hendrix *knew* that if the drugs were discovered on his person, he would be "in trouble with the law" (812).[27] Dr. Kinzel attributed special importance to the incident in September, 1971, wherein the appellant was hospitalized in Karachi, Pakistan, as a result of a fight on the S.S. JEFF DAVIS (782-784, 788). The doctor acknowledged however, that in the opinion of the psychiatrist attending the appellant in Karachi, Hendrix' condition in 1971 may very well have been due to the *excessive* use of drugs — namely, marijuana (819-820). Moreover, Kinzel was not

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"[H]e was trying to make it seem as if it was a rational act. . . A reasonable thing rather than an irrational act" (773-774).

In contrast to Kinzel's belief that Hendrix was not malingering, Dr. Taub, of the United States medical facility at Springfield, opined that appellant was making a heavy effort to appear psychotic, and he questioned appellant's motive for doing so (802-803).

[27] It should be noted that Dr. Kinzel claimed ignorance of many facts testified to at trial. For example:

1. He did not know that Hendrix had asked Kiedinger about the status of the gun (817-818).
2. He did not know about Hendrix' activities with the Russian girl and her family during the day of the murder (833-834).
3. He was not aware of Hendrix' concern about being turned over to Russian authority (807).
4. He was not aware that Hendrix told Manning (whom Kinzel believed to be reliable) that he knew what he did and that what he did was wrong (806).
5. Notwithstanding Gary Carter's testimony that Hendrix sought his help in getting rid of the bloody pants and boots, Kinzel, in his report of examination, noted that Hendrix made no attempt to avoid detection (836-837). Kinzel conceded however, that such evidence might constitute an attempt at avoidance of detection (838).

aware of the fact that Hendrix, after a brief stay at the hospital in Karachi, had been permitted to fly back to the United States unescorted (821), or that shortly after his return to the United States, Hendrix shipped out again on another vessel, the S.S. DEL RIO (708, 822).

Finally, Dr. Kinzel attached importance to the fact that Hendrix was unable to recall to him the details of the killing beyond a recollection of kicking the deceased (757-758). However, when confronted with the report of Dr. Irwin Perr,[28] where Hendrix stated that Kiedinger was beaten *after he was strangled*, Kinzel conceded the variance in the appellant's claimed recollections (835-836).

C. The Government's Rebuttal Case.

The Government called Dr. David Abrahamson to rebut the appellant's claim of insanity.[29] As a result of his examinations of Hendrix, and his study of voluminous materials,[30] Dr. Abrahamsen stated that it was his considered opinion that:

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[28] Dr. Perr testified for the defense at the first trial, but not at the second (Transcript of July 5, 1975, pp. 650-755).

[29] The Government will not burden this brief or the Court with a lengthy recitation of Dr. Abrahamsen's extensive qualifications, unchallenged by the defense, and attained after over forty years as a practicing psychiatrist (864-870). Suffice it to say that Dr. Abrahamsen was a member of the select commission in New York State that formulated for that state the definition of legal insanity also adopted by this Court in *United States* v. *Freeman*, 357 F.2d 606 (2d Cir. 1966).

[30] Dr. Abrahamsen relied on the following:

1. Two examinations he conducted of appellant;
2. Statements of crewmembers to the Federal Bureau of Investigation;
3. Statements by several crewmembers to the American Vice Consul;

[Footnote continued on following page]

> . . . . The defendant, Mr. Hendrix, at around midnight on December 29th, 1974, on the ship Eagle Voyager, didn't suffer from any serious mental disease or defect. And that he didn't lack any substantial capacity to know or to appreciate the wrongfulness of his conduct, or to conform his behavior to the requirements of the law (873).

Abrahamsen concluded that Hendrix' statements to various crewmen shortly after the murder indicated an awareness and an appreciation on appellant's part of the significance of his act of killing Kiedinger (874-877, 879-883, 910). Moreover, the doctor believed that Hendrix' actions and statements demonstrated appellant's belief in his own guilt (881). In contrast to Kinzel's progressive "mental breakdown" theory, Dr. Abrahamsen noted that Hendrix' activity with his Russian girlfriend on December 29th portrayed a man who was acting in a very rational and coherent manner (883-884). It was also perfectly consistent with rational behavior that appellant tried to secrete his hashish, the possession of which he knew was wrong (881-882).

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4. Coast Guard reports.
5. The report of the medical team at the facility at Springfield;
6. The tests administered to the appellant at Sprinfield;
7. Statements by the United States Marshals who accompanied Hendrix from Moscow to New York;
8. The report of the United States Public Health Service;
9. Hendrix' public school records;
10. The report of Dr. Perr;
11. The report of Dr. Kinzel;
12. The report of Dr. Schwartz;
13. The report from the authorities at Karachi, Pakistan; and,
14. The transcript of testimony of the witnesses at trial (870-873, 884-885).

The Government also introduced testimony from various members of the crew that during the voyage appellant never said or did anything that could be considered strange, bizarre or unusual (205, 281-282, 329, 382, 407). Captain Thomas characterized Hendrix' behavior during the journey from the ship to New York, via Moscow, as perfectly normal (533).

The trial court, as it had at the first trial, instructed the jury on the role of the presumption of sanity.[31] No exception was taken to this charge (1002, 1030). Though the trial court was willing, if requested, to instruct the jury[32] on the lesser-included offense of voluntary manslaughter the defense, for "tactical" reasons, felt that unless involuntary manslaughter was included it would forego any lesser-included offense instruction.[33]

After instructing the jury as to the applicable principles of law, including the Government's burden of proof with respect to both the elements of the offense and the issue of insanity, the Court instructed the jury that their verdict should take the form of either "Guilty" or "Not Guilty".

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[31] Counsel at the first trial carefully reviewed the intended charge generally and the presumption of sanity portion in particular (Transcript of July 9, 1975 at 861-863). The colloquy referring that portion of the charge is 1a-3a in the Government's appendix. The court's charge on this point, at the first trial is 3a-7a in the Government's Appendix.

[32] By incorporation, this offer and refusal at the first trial were placed in the record at the second trial.

[33] The colloquy on this issue at the first trial is 7a-10a to the Government's Appendix.

ARGUMENT

POINT I

The Court's instructions correctly placed upon the Government the burden of proving Hendrix' sanity beyond a reasonable doubt.

The trial court fairly and correctly instructed the jury on all applicable principles of law pertaining to this case. Counsel for appellant reviewed the charge before its delivery and candidly stated that he had "no complaint" with its wording or substance (1002), and there was no exception taken to the court's instructions as given (1030). Appellant now complains that an unobjected to reference [34] to the presumption of sanity in the charge was error of such magnitude as to warrant reversal. In effect, the complained of portion, set forth in f.n. 34, according to the appellant, erroneously permitted the jury to consider the presumption of sanity. The Government contends that this was not error. Indeed, appellant's experienced trial counsel expressly agreed to the inclusion of this presumption in the court's charge so long as "it was made clear that the Government has the burden of proving the question of defendant's sanity." (Government Appendix 2a-3a). This the court did.

After advising the jury that the Government's obligation was to prove beyond a reasonable doubt all the

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[34] You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may however, be overcome by evidence. You should consider these principles in light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive (1015).

elements of the crime of murder in the second degree, the court went on to instruct as follows:

> If however, you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider the defense of lack of criminal responsibility, or as it is sometimes called, the defense of insanity.
>
> The law provides that a jury shall bring in a verdict of not guilty if the following test is met: The defendant must be found not guilty if, at the time of the criminal conduct, the defendant, as a result of mental disease, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.
>
> A defendant who is intellectually aware that his act is wrongful is not responsible for that act if he does not appreciate the wrongfulness of that act because mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior can have little significance.
>
> Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for his acts. But that assumption no longer controls when evidence is introduced that he may have a mental disease or defect.
>
> The defense of lack of criminal responsibility, or as it is sometimes called, the defense of "insanity" does not require a showing that the defendant was disoriented as to time or place.
>
> Mental disease includes any abnormal condition of the mind, regardless of its mental label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The

> term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.
>
> In considering whether the defendant had a mental disease at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.
>
> The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty. (1010-1012).

The court thereafter charged the jury on the psychiatric and lay witness testimony bearing on the insanity issue. While the court advised the jury that they were not bound by the opinions of expert or lay witnesses, the court continued that such testimony should not be arbitrarily or capriciously rejected.

The court concluded this portion of its charge with a brief reiteration of the presumption of sanity. It is this segment, set forth above, at f.n. 34, taken out of context that appellant claims to be error.[35]

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[35] Immediately after this reiteration, the trial judge instructed the jury as to the additional relevancy of the appellant's insanity evidence. This portion of the charge is as follows:

> Where a defendant has raised the issue of his insanity, and the jury finds from the evidence in the case beyond a reasonable doubt that the accused was not insane at the time of the alleged offense, it is still the duty of the jury

[Footnote continued on following page]

It is appellant's contention, distilled to its essence, that the clear and succinct initial statement by the court on the presumption of sanity (1010-1012), was somehow destroyed by the later recapitulation (1015). Moreover, it is urged that despite the court's repeated and unequivocal instructions on the Government's burden of proof, the jury was driven to the verdict ultimately rendered.

As a preliminary proposition, the law is clear that if defense counsel thought the two references to the presumption of sanity were inconsistent or that the one was prejudicial, it was his obligation to so advise the court.[36] His failure to do so, requires an appellate court to examine the charge in its entirety to determine if the portion complained of was so substantial as to constitute plain error. See, *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975); *United States* v. *Bermudez*, 526 F.2d 89 (2d Cir. 1975). Upon such a reading it is obvious that, at the very least, the district court's first instruction on the presumption of sanity was correct and that the Government's burden of proof was forcefully set forth. *United States* v. *Davis*, 328 F.2d 864 (2d Cir. 1964); *United States* v. *Retolaza*, 398 F.2d 235 (4th Cir. 1968), *cert. denied*, 398 U.S. 1032.

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to consider all the evidence in the case which may aid determination of state of mind, including all evidence offered on the issue as to insanity, in order to determine whether the defendant acted or failed to act with the requisite malice aforethought, as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of acting with the requisite malice aforethought to commit the crime charged, the jury should acquit the accused.

As stated before, the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence (1015-1016).

[36] The specific language of the instruction was discussed at the first trial and resolved to the satisfaction of defense counsel (Government's Appendix, 1a-3a).

Turning to an analysis of the actual charge, the court initially told the jury that since evidence of insanity has been introduced during the course of the trial, the presumption of sanity "*no longer controls*" (emphasis added). From that point on the jury knew that the presumption was out of the case. The court, in effect, had merely used the presumption of sanity as nothing more than a convenient starting point for its complete, detailed and accurate instructions on appellant's insanity defense. Appellant would now elevate that starting point in the instruction, to an end in itself. To do as appellant urges, would give that instruction too much weight and the remainder of the charge none whatsoever.

When viewed *in toto*, it is obvious that the district court correctly charged that the Government had the burden of proving that the appellant was sane beyond a reasonable doubt. This is exactly what is required. Accordingly, there was no reversible error, if any error at all.

POINT II

The trial court correctly concluded that there was no evidence, however weak, upon which the jury could have rationally returned a guilty verdict of involuntary manslaughter; and to have charged that crime as a lesser-included offense would have been to invite speculation and compromise.

Counsel for appellant conditionally requested that the court charge the jury on the allegedly lesser-included offenses of voluntary and involuntary manslaughter (Government's Appendix at 7a-8a).[37] It was conditional in that, unless the court was agreeable to instructing

[37] Defense counsel's request made during the first trial was incorporated by reference as his request for the charge in the second trial (3-16).

both offenses, counsel wanted to proceed solely on the charge of murder in the second degree (Government's Appendix 8a). It was trial counsel's theory that the jury "might be satisfied" that Hendrix merely committed a simple assault upon Kiedinger when he kicked him repeatedly in the head. Both the court and the prosecutor expressed doubt that such activity—uncontradicted or challenged—constituted a simple assault.

Moreover, when confronted with the evidence of strangulation, appellant's defense counsel was unable to explain to the court how the jury could rationally find a simple assault upon which guilt of involuntary manslaughter would be predicated. Thus, although counsel correctly asserted that there was evidence in the record that would justify an instruction on voluntary manslaughter,[38] he precluded the trial court from so charging unless involuntary manslaughter was charged as well.

There is no question that manslaughter is a crime included within the charge of murder, and appellant, *had the evidence permitted*, would have been entitled to an instruction on involuntary manslaughter. *Sansone* v. *United States*, 380 U.S. 343, 349-350, (1965); *Berra* v. *United States*, 351 U.S. 131, 134 (1956); *Stevenson* v. *United States*, 162 U.S. 313 (1896); *Sparf* v. *United States*, 156 U.S. 51, 63-64 (1895).

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[38] Appellant pointed out that psychiatric testimony submitted by the defense allowed for the explanation that the killing was the result of a sudden heat of passion. No testimony was called to the court's attention justifying simple assault and derivatively, involuntary manslaughter. Appellant speculates that, "if a simple assault produced a death, the highest degree of crime would be involuntary manslaughter." Appellant's Brief, p. 27. Such conjecture "in the teeth of both law and facts" is precisely that kind of irrationality that would have precluded a guilty verdict on involuntary manslaughter. *United States* v. *Markis*, 352 F.2d 860, 867 (2d Cir. 1965), *vacated on other grounds* 387 U.S. 425 (1967), quoting from *Horning* v. *District of Columbia*, 254 U.S. 135 (1920).

The initial inquiry however, is whether or not there was a disputed factual element which would have permitted the jury to rationally conclude that Hendrix was guilty of a lesser offense but not guilty of the greater. *United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1972); *United States* v. *Markis*, 352 F.2d 860 (2d Cir.), *vacated on other grounds*, 387 U.S. 425 (1967); Model Penal Code, § 1.07(5). Had appellant requested and been refused an instruction on voluntary manslaughter, the answer would be clear. The only factual element in dispute was whether Hendrix went to Kiedinger's room with malice aforethought or to "rehabilitate" his friendship. If he killed under the latter circumstances an argument might be made for a killing upon a sudden quarrel or in the heat of passion. But appellant's all or nothing direction to the trial court removed the possibility that the jury might accept such an argument.

There is no question however, but that there was no evidence pointing toward a simple assault.[39] Only if there was a foundation in the evidence for the notion of simple assault could the court have properly instructed on involuntary manslaughter. *Sparf* v. *United States*, *supra*, 63-64; *United States* v. *Carroll*, 510 F.2d 507, 509 (2d Cir. 1975); *cf. United States* v. *Marin*, 513 F.2d 974 (2d 974 (2d Cir. 1975). In the absence of such competing factual contentions, to instruct on a lesser-included offense, such as was requested here, would:

> . . . "[O]nly invite the jury to pick between the [greater and lesser degrees] so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge. *Sansone* v. *United States*, *supra*, at 350 n.6; *United States* v. *Harary*, *supra*, 477.

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[39] See, *United States* v. *Hamilton*, 182 F. Supp. 548 (D.D.C. 1960), (shoes are dangerous weapons when they inflict serious injury).

As stated by the Court of Appeals in *Driscoll* v. *United States*, 356 F.2d 324, 327 (1st Cir. 1966), *vacated on other grounds*, 390 U.S. 202 (1968), the import of *Sansone* is:

> That when the government has made out a compelling case, uncontradicted on the evidence, on an element required for the charged offense, there is a duty on the defendant to come forward with some evidence on the issue, if he wishes to have the benefit of a lesser-included offense charge.
>
> To put it another way, while a judge cannot prevent a jury from rejecting the prosecutor's entire case, he is not obligated, under these circumstances to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecutor's case by giving a lesser included offense instruction. Two prerequisites seem vital: That there be no factual dispute and that a finding contrary to the only evidence on the issue must be irrational.

Applying these principles to the instant case, it is patent that an involuntary manslaughter instruction would have been unwarranted. Appellant claims that no evidence was presented as to the specific facts of the *fight* between Hendrix and Kiedinger.[40] The short answer is that there was no *fight* betwen the two. The record is barren of such testimony. Indeed, Captain Thomas testified that Kiedinger's room showed no sign of any struggle at all (529-530). Moreover, various crewmen testified that Hendrix had no cuts, bruises, or marks of any kind on him that might have indicated a fight. (200-201, 279, 327, 351, 459). And as for the notion that this was a simple striking so as to qualify as a misdemeanor assault,

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[40] Appellant's Brief, p. 30.

one need only recall the testimony of Johnson and Bellinger, who testified that the deceased's face was covered in blood and so disfigured as to be beyond recognition (195, 455). Additionally, the Medical Examiner related that Kiedinger's face showed numerous abrasions, contusions and lacerations as well as a broken nose (501-504, 507). Of course, as appellant contends, the jury was free to reject the medical examiner's testimony and was also free to reject the testimony of Bellinger and Johnson. However, the mere rejection of trial evidence, as this Court has held:

> ". . . does not elevate the issue to a truly 'disputed' one; . . . it does not provide a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *United States* v. *Markis, supra*, 867. See also, *United States* v. *Marcey*, 440 F.2d 281, 285, (D.C. Cir. 1971).

As defense counsel had correctly determined, there may have been evidence warranting a finding of guilt for the offense of voluntary manslaughter and the trial court stood ready to so instruct. The issue would have been one of malice aforethought against sudden quarrel or heat of passion. In this Court appellant now suggests, without any support in the record, that the jury should not have been precluded from finding that death was the "accidental" result of a simple assault.[41] For the trial court to have so allowed, would have been to tolerate speculation and conjecture on the part of the jury. It would have been an open invitation to disregard the evidence of record and to render a foundationless verdict.

Counsel below made what he termed a "tactical choice" [42] when he turned aside a lesser-included instruc-

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[41] Appellant's Brief, p. 30.

[42] Government's Appendix at 10a.

tion on voluntary manslaughter in favor of an all or nothing approach. His rationale was that a murder charge versus a voluntary manslaughter charge would have invited a compromise. However, counsel's desire for a murder, voluntary *and* involuntary manslaughter charge would have stood this abhorrence of compromise argument on its head and almost certainly have compelled one.

The ruling of the court was correct, and counsel's tactical trial choice should not now be permitted to elevate it to plain error.

POINT III

The trial court, properly following the clear law of this Circuit, correctly refused to instruct the jury that appellant could be found "not guilty by reason of insanity."

Defense counsel requested that the jurors be charged that they could find the appellant not guilty by reason of insanity. The trial court ruled that such an instruction was not authorized (944-945). This was correct. In *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), this Court held:

> This Circuit does not provide for a verdict of 'not guilty by reason of insanity' as requested by appellant. [Citation omitted]

Therefore, the court below was without discretion in the matter and properly limited the jury to the traditional verdict forms of guilty or not guilty. *White* v. *United States*, 387 F.2d 367 (5th Cir. 1967); Wright, Federal Practice & Procedure, § 512 at 365-368.

Moreover, the trial court clearly advised the jury that even if the Government had proved Hendrix' guilty beyond a reasonable doubt they must still return a verdict of "not guilty" if the Government had not proved his sanity at the time of the murder beyond a reasonable doubt. This charge was, as follows:

> The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defeat, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. *If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty.* (1011-1012) (Emphasis supplied).

This was, in effect, the functional equivalent of a verdict of not guilty by reason of insanity.[43]

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[43] In federal jurisdictions outside of the District of Columbia, a trifurcated verdict form makes little sense and can only create a misleading impression in the minds of the jurors. By operation of a local District of Columbia statute, verdicts of "not guilty by reason of insanity" result in proceedings leading to the institutionalization of an offender. See, D.C. Code § 24-301(d). No similar provision exists for other federal courts. While this *gap* has been signaled before, *Freeman* v. *United States*, 357 F.2d 606. 625 (2d Cir. 1966), there has been no remedial legislation; hence, no logical reason exists, absent subsequent commitment procedures, to present such a verdict. Such a verdict choice can only serve to impl. to the jury that some post-verdict confinement or treatment will occur. This, of course, is not the case, Wright, *supra*, at 368.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: July 12, 1976

Respectfully submitted,

DAVID G. TRAGER,
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[*] The United States Attorney's Office wishes to acknowledge its appreciation to Mr. James Connors for his assistance in the preparation of this brief. Mr. Connors is a third year law student at New York Law School.

APPENDIX

[861]

Mr. Dawson: I would just ask Mr. Chrein as we have now worded it, whether he has any quarrel.

Mr. Chrein: I said I have none.

The Court: He has no quarrel with it, so I will charge it as I have it.

Now specific intent will be out, I have very, very grave doubts about it.

Again, as to the malice charge, well, as Mr. Dawson has given it to us plus number 8, but without the last sentence of 8.

Mr. Chrein: Your Honor, if I can raise something, the Government in its request to charge on page 5, the last paragraph of that charge says:

> "You may also consider that every man is presumed to be sane," etcetera.

Now I feel that in view of the Government's burden in this case, such a charge would only serve to confuse the jury because a presumption, as it is usually defined, is an item of proof which if no evidence is produced to the contrary, is in the case as a proven fact.

The Court: Yes.

Mr. Dawson: You are talking about what?

The Court: He is referring to page 5' "You may [862] may also consider that every man is presumed to be sane, that is, to be without mental disease or defect."

Now, I have continued on that with the words:

> "But that presumption no longer controls what evidence is introduced that he may have a mental diesase or defect."

Mr. Chrein: I think that satisfies my need.

The Court: Then I have a series of definitions.

Mr. Dawson: Well then, so your Honor will say that the man is presumed to be sane, however?

The Court: I say it no longer controls when evidence is introduced that he may have a mental disease or defect, where there is such evidence.

Mr. Dawson: Will your Honor include the last sentence on page 5?

"You should consider this principle in the light of all the evidence in the case and give it such weight as you believe it is fairly entitled to receive."

Mr. Chrein: I feel that would be objectionable.

Mr. Dawson: Objectionable?

Mr. Chrein: Tacked on to what the judge has just said.

[863]

Mr. Dawson: I just thought we are working on the presumption of sanity question.

The Court: That is all part of it, that is a part of the entire thing.

Mr. Dawson: I just thought it would be appropriate.

The Court: What is it you want?

Mr. Dawson: On page 5, the last sentence, if you do talk about the presumption of sanity, then your Honor should do something about the presumption of insanity.

The Court: I will put it right on the bottom of this page:

> "You should consider this principle in the light of all of the evidence in the case and give it such weight as it is fairly entitled to receive."

That will be after whether the defendant had a mental disease and so forth and so on That would be the presumption and it would be just the other side of the coin of the presumption.

Mr. Chrein: I would have no objection as long as it is made clear that the Government has the burden of proving the question of defendant's sanity.

The Court: We have that, beyond a reasonable [864] doubt, it is their duty.

Mr. Chrein: In addition to the elements of the crime as well as the responsibility of the defendant.

The Court: We have both.

Mr. Dawson: We have also in our request, I think the very first request, we have said:

> "The Government has offered evidence in opposition to it. The burden of proof is upon the Government to prove beyond a reasonable doubt that the defendant was responsible—that is to say, sane."

The Court: We have the whole thing.

Mr. Chrein: Your Honor, is the Court going to charge that it is relevant in considering the question of, or capacity on December 29, 1974, his condition before and after the event?

The Court: We have that, too, that will also be included. That will be in there.

Mr. Chrein: That is my second charge.

Also about the opposite end of the coin, which is in my request number 3, that is if he was sane at earlier and later times.

* * * * *

(945)

If you find that the Government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty.

If however, you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider the defense of lack of criminal responsibility.

The law provides that a jury shall bring in a verdict of not guilty if the following test is met: the defendant

must be found not guilty if, at the time of the criminal conduct, the defendant, as a result of mental disease either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appre[illegible]te the wrongfulness of his conduct.

A defendant who is intellectually aware that his act is wrongful is not responsible for that act if he does not appreciate the wrongfulness of that act because mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior can have little significance.

Every man is presumed to be sane, that is, to be without mental disease or defect, and to be responsible for (945(a)) his acts. But that assumption no longer controls when evidence is introduced that he may have a mental disease or defect.

The defense of lack of criminal responsibility, or as it is sometimes called, the defense of "insanity" does not require a showing that the defendant was disoriented as to time or place.

Mental disease includes any abnormal condition of the mind, regardless of its mental label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.

The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate

the wrongfulness (946) of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty.

In considering the defense of lack of criminal responsibility or insanity, you may (947) consider the evidence that has been admitted as to the defendant's mental condition before and after the offense charged, as well as the evidence as to defendant's mental condition on that date. The evidence as to defendant's mental condition before and after that date was admitted solely for the purpose of assisting you to determine the defendant's condition on the date of the alleged offense.
[948]

The Court: (continuing) You have heard the evidence of psychiatrists who testified as expert witnesses. An expert in a particular field is permitted to give his opinion in evidence. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions as to what is or not a mental disease. Why psychiatrists and psychologists may or may not consider a mental disease for clinical purposes where their concern is treatment, or may not be the same as mental disease for the purpose of determining criminal responsibility. Whether the defendant has a mental disease must be determined by you under the explanation of those terms as it has been given to you by the Court.

There is also testimony of lay witnesses with respect to their observations of the defendant's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them, and may express an opinion based upon those observations and facts known to them.

In weighing the testimony of such lay witnesses you may consider the circumstances of each witness, his opportunity to observe the defendant, and to know the facts to which he has testified, his willingness and [949] capacity to expound freely as to his observations and

knowledge, the basis for his opinions and conclusions and the nearness or remoteness of his observations of the defendant in point of time to the commission of the offense charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the defendant, or whether the witness observed the defendant conduct to be free of such extraordinary or bizarre act. In evaluating such testimony, you should take into account the extent of the witnesses observation of the defendant, and the nature and length of time of the witness' contact with the defendant. You should bear in mind that an untrained person may not be readily able to detect mental disease, and that the failure of a lay witness to observe abnormal acts by the defendant may significant only if the witness had prolonged and intimate contact with the defendant.

You are not bound by the opinions of either expert of lay witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case, and give it such weight as you believe it is fairly entitled to receive.

[950]

You may also consider that every man is presumed to be sane, that is, to be without mental disease, and to be responsible for his acts. A presumption may, however, be overcome by evidence. You should consider these principles in the light of all the evidence in the case, and give them such weight as you believe they are fairly entitled to receive.

Where a defendant has raised the issue of his insanity, and the jury finds from the evidence in the case beyond a reasonable doubt that the accused was not insane at the time of the alleged offense, it is still the duty of the jury to consider all the evidence in the case which may aid

determination of state of mind, including all evidence offered on the issue as to insanity, in order to determine whether the defendant acted or failed to act with the requisite malice aforethought, as charged.

If the evidence in the case leaves the jury with a reasonable doubt whether the mind of the accused was capable of acting with the requisite malice aforethought to commit the crime charged, the jury should acquit the accused.

As stated before, the law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence.

[872]

The Court: All right. Did you get what he said?

Law Clerk: I will try to get it.

Mr. Chrein: Your Honor, on the question of—One other question that we might want to resolve while we are here.

The Court: Yes.

Mr. Chrein: There is a question as to whether the evidence in this case would justify charging manslaughter to the jury. I believe Dr. Perr in his testimony did say something about the nature of the act of violence. In other words, the way he was choked.

The Court: Yes.

Mr. Chrein: Which implied something about a heat of passion. The heat of passion is the language used in the statute, I believe, but something —

The Court: Just a moment.

The Chrein: Your Honor, in any event, there was testimony from Dr. Perr, that the defendant—the manner of the killing implied a killing that was more in the nature of a heat of passion type of event.

Also, the additional evidence in the case would tend to show—I mean, if isolated and taken apart from the evidence of the grudge, which may or may not exist——

The Court: Are you looking for a lesser degree (873) charge?

Mr. Chrein: I would—My point is that I would—I would request a lesser degree charge if both degrees of manslaughter were charged. If the Court Charges one degree of manslaughter, I would just as soon proceed on the murder in the second degree.

Mr. Dawson: Voluntary manslaughter?

Mr. Chrein: Yes. The basis for the voluntary manslaughter charge would be that involuntary manslaughter has been defined as a killing done in the commission of a wrongful act that would not be a felony. The evidence—

The Court: How would you do that in this case?

Mr. Chrein: It's very simple.

The Court: Yes?

Mr. Chrein: The evidence isolated from the question of the grudge, which may or may not be a valid motive, in view of some evidence in the case that the log was being rescinded, or words to that effect, would show that the—there was an assault without a weapon on the deceased.

An assault in the maritime or territorial jurisdiction of the United States by beating, wounding or striking, is one form of misdemeanor, and an assault within the maritime or territorial jurisdiction of the United States—I have Xeros sections, but I left them (874) in the courtroom—any other form is a lesser degree of a misdemeanor. If the jury could be satisfied that there was a simple assault upon Mr. Kiedinger, that resulted in his death—and if I recall, there is no weapon, no attempt to commit robbery, murder or rape.

The Court: You say kicking him in his head with a boot—I don't know if that is simple assault.

Mr. Chrein: I submit that a boot might not be a weapon.

The Court: Well,—

Mr. Dawson: I would agree that the—

The Court: If it was a baby's boot, maybe it's not

a weapon. But it was a man's boot that you wear on a ship.

Mr. Dawson: I would agree with Mr. Chrein that Dr. Perr's testimony has indicated the possibility—if the jury chooses to credit it—of a voluntary manslaughter.

The Court: Second degree.

Mr. Dawson: But the involuntary manslaughter, I don't know. I don't see—

Mr. Chrein: In this case, if the Court is not inclined to give both degrees of manslaughter I would just as soon proceed on the murder—or the murder.

Mr. Dawson: Well—

[875]

The Court: I don't want to deny you. You have a right to request the degrees. But I am trying to——What do I tell the jury about the lesser degree of manslaughter? Involuntary——

Mr. Chrein: I believe the definition of the two degrees of an assault within the maritime or territorial jurisdiction of the United States, coupled with involuntary manslaughter, is an assault—is a killing done in connection with a commission of a wrongful act, not amounting to a felony, would justify the inclusion of a charge of involuntary manslaughter.

Mr. Dawson: Well, that assault was certainly not a misdemeanor, where he said he was kicking him about the dead. Certainly not a misdemeanor.

The Court: How about the choking? This again——

Mr. Dawson: You know—and the strangling.

The Court: The strangling.

Mr. Dawson: It is clearly not a misdemeanor.

The Court: That can't be involuntary at that point. It can be a manslaughter, but it can't be involuntary.

Mr. Chrein: In that case, the defendant is making—

The Court: I don't think so.

Mr. Chrein: The defendant is making no request

for inclusion of manslaughter in this case.
[876]

The Court: Okay.

Mr. Chrein: One further——

Mr. Dawson: Before you get to that, is that your—Notwithstanding that you are not going to Charge voluntary manslaughter in any event——

The Court: No. If he doesn't want it, I won't Charge it. I think it is his prerogative as to whether or not he wants the lesser degrees. But the lesser degrees can only come from the evidence that is produced before the Court. And I can't see involuntary manslaughter—a charge of involuntary manslaughter at this time, after taking into consideration all the evidence in the case.

Mr. Chrein: I know it is not essential, but I would say very briefly for the record that this is a tactical choice. I don't——

The Court: I understand.

Mr. Chrein: I feel that—I am afraid the jury would compromise on that, rather than consider an acquittal. This is——

The Court: If you can read these jurors, or any jury,——

Mr. Chrein: I can't read a jury's mind.

The Court: Then you're better than I am.

Mr. Chrein: I told my client I might be wrong.

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Attorney for _____

Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

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Attorney for _____
Office and P. O. Address,
U. S. Courthouse
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Brooklyn, New York 11201

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